

No. 25-1312

IN THE
Supreme Court of the United States

DEXTER PAYNE, Director,
Arkansas Division of Correction,

Petitioner

v.

HARL A. GARRETT,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under Arkansas law, a prisoner seeking to redress a *Strickland v. Washington*, 466 U.S. 668 (1984), violation based on trial counsel’s failure to file a notice of appeal must seek relief through a motion for a belated appeal rather than an ordinary post-conviction petition.

Respondent filed a motion for a belated appeal under Rule 2(e) of the Arkansas Rules of Appellate Procedure—Criminal. It remained pending for twenty days. In federal habeas proceedings, the district court found Respondent’s petition untimely by about a week, declining to toll the statute of limitations for the pendency of the belated-appeal motion. The Eighth Circuit reversed, concluding that the petition was timely because the belated-appeal motion qualified for tolling under 28 U.S.C. § 2244(d)(2).

The Question Presented is:

Whether the Eighth Circuit correctly held that an Arkansas motion for a belated appeal qualifies as an application for “post-conviction or other collateral review with respect to the pertinent judgment or claim” under § 2244(d)(2).

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BRIEF IN OPPOSITION

INTRODUCTION

This case does not warrant this Court’s intervention. The ruling below applies this Court’s § 2244(d)(2) case law to an unusual Arkansas procedure—the belated appeal motion—invoked by Respondent Harl Garrett after his conviction was final. Arkansas law channels *Strickland* claims based on counsel’s failure to file a notice of direct appeal into such motions and out of ordinary postconviction review. Such motions are usually resolved quickly, so their tolling rarely affects a habeas petition’s timeliness. The Question Presented is thus neither important nor recurring, as reflected in a particularly shallow circuit split, despite three decades of AEDPA: only the Eleventh Circuit’s application of Florida law takes a different path. Manufacturing procedural parity between Arkansas and Florida is not a compelling reason for certiorari, particularly under a statute where state-by-state variation is the norm.

The decision below is also correct. After his conviction became final and the time for appeal expired, Mr. Garrett utilized the collateral vehicle Arkansas law designated for his *Strickland* claim—something all prisoners must do in order to comply with habeas exhaustion. If the Arkansas court had given him leave to pursue a belated appeal, he would have obtained the initial state-court review that his counsel’s ineffectiveness denied him. Pursuing such post-conviction litigation qualifies as “post-conviction or other collateral review with respect to the pertinent judgment or claim” under § 2244(d)(2). That result also promotes comity, as it enables

state courts to fully resolve this kind of *Strickland* claim in the first instance, before federal district courts are asked to intervene via habeas. The Petition should be denied.

STATEMENT OF THE CASE

A. Legal background

Federal Law. A state prisoner must file a federal habeas petition within one year of the conclusion of direct review. 28 U.S.C. § 2244(d)(1)(A). That clock tolls, however, while “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” § 2244(d)(2). “Collateral review” means review that is “‘secondary,’ ‘indirect,’ or ‘ancillary’”—it is “review that is ‘[l]ying aside from the main’ review, *i.e.*, that is not part of direct review.” *Wall v. Kholi*, 562 U.S. 545, 551 (2011) (quoting Webster’s Third New International Dictionary 444 (1993)).

State Law. Arkansas, like every other state, provides an ordinary postconviction remedy after direct review concludes. See Ark. R. Crim. P. 37. But Rule 37 does not reach every collateral claim. To assert that trial counsel deficiently failed to file a notice of appeal—as happened here—an Arkansas prisoner must move for a “belated appeal” under Rule 2(e) of the Arkansas Rules of Appellate Procedure—Criminal. See *McDonald v. State*, 146 S.W.3d 883, 888, 890 (Ark. 2004). This specialized motion can also be used to redress instances where state action, through no fault of the defense, resulted in forfeiture of the direct appeal. *Id.* at 888. The motion is thus designed to redress “a denial of due process and a denial of effective assistance of counsel.” *Id.* at 890. And, as its label suggests, such a motion “is not part

of the ordinary appellate review process.” *Dodson v. Norris*, 288 S.W.3d 662, 665 (Ark. 2008).

Arkansas strictly polices the boundary between the belated-appeal motion and ordinary Rule 37 petition. A *Strickland* claim in Rule 37 “is not a means of by-passing a motion for belated appeal[.]” *Lomax v. State*, 688 S.W.2d 283, 285 (Ark. 1985); see *Robbins v. State*, 705 S.W.2d 6, 7–8 (Ark. 1986); *Shuffield v. State*, 729 S.W.2d 11, 12 (Ark. 1987); cf. *Shoemate v. Norris*, 390 F.3d 595, 598 (8th Cir. 2004) (recognizing the same and citing *Robbins*, 705 S.W.2d at 7). It is thus well established that a *Strickland* claim for failing to file a timely appeal “is not ... cognizable under [Arkansas’s] post-conviction rule.” *Davis v. State*, No. CR 90-288, 1991 WL 31173, at *1 (Ark. 1991). For that reason, the belated-appeal motion functions as the exhaustion vehicle for such claims to be presented in federal habeas review. See, e.g., *McDuffie v. State*, 826 S.W.2d 809, 809–10 (Ark. 1992) (complying with a federal writ issued due to a *Strickland* violation left uncorrected by the state court’s erroneous denial of a belated-appeal motion); *Philyaw v. State*, 728 S.W.2d 150, 151 (Ark. 1987).¹

B. Prior proceedings

Respondent Harl Garrett had no prior criminal history, App. 59a, before the State tried and convicted him of second-degree sexual assault, App. 58a. Following his

¹ Petitioner mischaracterized Arkansas law to the courts below. The State suggested—and the Eighth Circuit entertained for the sake of argument—that Arkansas courts would hear such a *Strickland* argument in a Rule 37 petition concurrent with, or in lieu of, a belated-appeal motion. See App.15a n.7 (panel ruling, citing the State’s argument); Appellee C.A. Br. 18 (principal brief below); D.C. Doc. No. 11 at 6–7 (district court answer). The certiorari petition, however, does not repeat that assertion, which is incorrect.

sentencing, Mr. Garrett asked his attorney to file an appeal. App. 2a–3a, 28a (citing Doc. No. 11-3). But counsel failed to file the notice—a hornbook violation of the Sixth Amendment right to counsel. See, *e.g.*, *Garza v. Idaho*, 586 U.S. 232, 241 (2019) (following *Roe v. Flores-Ortega*, 528 U.S. 470, 477–78 (2000)).²

Instead of appealing, counsel moved to withdraw, advising the trial court that a conflict of interest rendered him unsuited to handle the case. App. 3a, 28a. Nine days after the appellate deadline had already expired, Mr. Garrett received a letter from the now-withdrawn attorney informing him that he was now “on his own.” App. 4a, 29a. The lawyer enclosed a *pro se* notice of appeal, which Mr. Garrett promptly signed and mailed back. App. 4a, 29a. A month later, Mr. Garrett tried to file a belated-appeal motion, but the state court returned it for missing paperwork. App. 4a, 29a–30a. Three months later, he properly filed the motion, which sat pending for approximately twenty days before being summarily denied. App. 4a, 30a, 55a.

Mr. Garrett filed his federal habeas petition on October 19, 2020—just over a year after the appellate deadline expired and he first learned of counsel’s withdrawal. App. 30a, 33a–34a. A federal magistrate judge recommended dismissal, calculating the petition late by a mere six or eleven days, depending on the mailbox rule. App. 32a,

² Mr. Garrett had strong reasons to appeal. Among others, the trial court improperly barred his defense from eliciting evidence about a heated conflict between him and the complainant’s guardian. See D.C. Doc. 11-14 at 110 (opening statement); *id.* at 244–46 (barring testimony from complainant’s mother); *id.* at 281–85 (barring testimony from complainant’s grandmother); *id.* at 262–64, 277 (barring his own testimony). That bitter dispute was the defense’s theory for why complainant was coaxed into making a false report. Having been barred from presenting circumstantial evidence of bias and motive, Mr. Garrett’s defense was limited to him testifying to deny the assault, but the jury credited the complainant and convicted.

36a n.4. Though the belated-appeal motion was “properly filed” and concerned “the pertinent judgment,” the magistrate judge declined to toll the twenty-day period it was pending. The magistrate judge reasoned that it was neither “collateral” (because it “related to the direct review process,” App. 36a) nor “review” (because it functioned as a request for later review, App. 40a–41a). The district court adopted the recommendation but granted a certificate of appealability. App. 23a–25a.

The Eighth Circuit reversed, concluding that the belated-appeal motion triggered statutory tolling under § 2244(d)(2). App. 10a–16a. Applying this Court’s precedent, the panel reasoned that the motion was “collateral” because this Court in *Kholi* defined “collateral” review to mean anything outside of direct review, and a belated-appeal motion “necessarily occurs outside of the direct review process”—a reality the Arkansas Supreme Court has itself acknowledged. App. 10a & nn.4–5 (citing *Dodson*, 288 S.W.3d at 665). The panel likewise held the motion constituted “review,” since it was a “direct request[] for judicial review of a judgment,” and if such a request prevailed, the state court was required to hear an appeal. App. 11a (quoting *Kholi*, 562 U.S. at 556 n.4) (alteration in original). Finally, the panel emphasized that its reading of the statute is necessary to preserve state-federal comity, because Mr. Garrett’s motion gave the state court the first opportunity to redress the same constitutional claim that was pending in federal court. App. 14a–15a & n.7.

REASONS FOR DENYING THE PETITION

The State seeks review of the Eighth Circuit’s application of § 2244(d)(2) to Arkansas’s belated-appeal mechanism, the exclusive state-law vehicle for redressing

Strickland violations that forfeit a direct appeal. Nothing about that rule warrants certiorari.

The asserted split is shallow and overstated. It is ultimately an Arkansas-Florida disparity, rather than a circuit-wide disparity. The question also is unimportant. In most States, the question cannot arise at all. And even when it can arise, it controls timeliness only when a rare sequence of events aligns. The *amici* and State’s conjecture about incentives that supposedly harm finality is also unfounded. No rational prisoner would intentionally forfeit a plenary direct appeal just to secure some brief habeas tolling from the pendency of a belated-appeal motion.

The Eighth Circuit’s decision is also correct under the plain text of § 2244(d)(2), *Kholi*, and AEDPA’s broader statutory structure. And this case is a poor vehicle in any event: antecedent state-law questions, a thinly reasoned one-case outlier, and an interlocutory posture do not warrant expending this Court’s limited resources. The Petition should be denied.

I. The split is overstated

The Question Presented depends heavily on state law and procedure. *Kholi* supplies the federal definition of collateral review: “a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process.” 562 U.S. at 553. What fills that definition is a question of each State’s own procedural system. Whether a given filing lies inside or outside direct review, what claim it adjudicates, and what relief it can accomplish are questions of state law, answered by each State’s rules and each State’s highest court. *See Carey v. Saffold*, 536 U.S. 214, 223 (2002)

(in applying § 2244(d), courts “look to how a state procedure functions”); *Danny*, 811 F.3d at 1304–05 (same).

In most states, the Question Presented can never arise. As this Court has observed, if an attorney fails to file a notice of appeal, the defendant’s redress often comes via a *Strickland* claim in ordinary postconviction review. *Garza*, 586 U.S. at 237 (citing *Strickland*, 466 U.S. at 687–88, and *Flores-Ortega*, 528 U.S. at 484). That is the law in Idaho, *see id.* at 236 (ordinary postconviction, citing *Garza v. State*, 405 P.3d 576, 578 (Idaho 2017)); in California, *see Flores-Ortega*, 528 U.S. at 474 (ordinary state habeas); in Nevada, *see Lozada v. Deeds*, 498 U.S. 430 (1991) (ordinary postconviction); and in Texas, *see Jimenez v. Quarterman*, 555 U.S. 113, 116 (2009) (forfeited direct appeal revived via ordinary state habeas, Tex. Code Crim. P., art. 11.07, on due-process grounds); *see also Ex parte Axel*, 757 S.W.2d 369, 374 (Tex. Crim. App. 1988) (ordinary state habeas review of a *Strickland* claim). That is also how many other jurisdictions, including the federal government, review such claims.³

³ An unexhaustive sample of other jurisdictions that similarly handle such *Strickland* claims in ordinary postconviction includes, *e.g.*, *State v. Solano*, 543 P.3d 278, 280 (Ariz. App. 2024) (ordinary Ariz. R. Crim. P. 32 petition); *Esters v. State*, 894 So. 2d 755, 763 (Ala. Crim. App. 2003) (ordinary Ala. R. Crim. P. 32 petition); *Ritter v. State*, 213 S.W.3d 695, 695 (Mo. Ct. App. 2006) (ordinary Mo. S. Ct. R. 29.15 petition); *State v. Ammons*, 990 N.W.2d 897, 899 (Neb. 2023) (ordinary Neb. Rev. Stat. § 29-3001 motion for postconviction relief); *Kamara v. State*, 671 N.W.2d 811, 813 (N.D. 2003) (ordinary Uniform Post-Conviction Act motion); *State v. Pentecost*, 868 N.W.2d 590, 592 (S.D. 2015) (noting use of state habeas corpus or postconviction motion to withdraw plea).

The federal system is the same, *see, e.g., Barger v. United States*, 204 F.3d 1180, 1182 (8th Cir. 2000) (a *Strickland* claim in the § 2255 motion), though some district courts have entertained extending the notice of appeal deadline if counsel asserts their own excusable neglect during the 30-day window under Federal Rule of

The asserted “split,” Pet. 13–14, is not a circuit-wide divide between every case arising in two circuits. Rather, it is a divergence between two Courts of Appeals applying two different States’ procedural schemes. The Eleventh Circuit’s rule construes Florida law: *Espinosa* and *Danny* turned on how a petition under Florida Rule of Appellate Procedure 9.141 functions within Florida’s system. See *Danny*, 811 F.3d at 1303–05. The Eighth Circuit’s decision below construes Arkansas law. The most one can say about any “split” is that there is a divide between the treatment of Arkansas procedure and Florida procedure. Ensuring Arkansas-Florida parity does not warrant this Court’s review, particularly in a scheme where state-by-state variation is the norm.

Notably, the Eleventh Circuit’s rule does not even span that circuit’s three states. Alabama uses the ordinary postconviction remedy. See *Esters*, 894 So. 2d at 763. And until a year ago, Georgia did too, see *Cook v. State*, 870 S.E.2d 758, 762 (Ga. 2022) (directing such claims to go through state habeas), although a 2025 statute created a standalone remedy for the *Flores-Ortega* type of *Strickland* claims whose state caselaw has yet to develop. See Ga. Code Ann. § 5-6-39.1(a)(1)(D) (directing a motion be filed asserting that a failure to file notice of appeal “was attributable to the deficient performance of such defendant’s counsel”). The scope of the circuit split thus boils down to a single, Florida-based outlier.

Appellate Procedure 4(b)(4). See 16A C. Wright & A. Miller, *et al.*, Federal Practice and Procedure § 3950.9 & nn.28–29 (5th ed. 2019).

The Petition seeks certiorari to the Eighth Circuit, but at bottom, the Petition asks this Court to correct the Arkansas Supreme Court on its characterization of an Arkansas procedural rule. Applying *Kholi*'s definition, the Eighth Circuit panel looked to *Dodson*, the Arkansas Supreme Court's authoritative holding that a Rule 2(e) belated-appeal motion "is not part of the ordinary appellate review process." App. 10a (quoting *Dodson*, 288 S.W.3d at 665). The only way to reverse that application of *Kholi* would be to review and overturn Arkansas's classification of Arkansas's own procedures. Such a request is an untenable basis for certiorari.

Arkansas is peculiar in its own right. As explained above, the belated-appeal motion is the exclusive vehicle for Sixth Amendment claims premised on a forfeited notice of appeal. That limitation is part and parcel of the text of Rule 37, which does not authorize a new direct appeal as cognizable relief. Ark. R. Crim. P. 37.1 (limiting available relief to release, a new trial, or sentence modification). And there are countless published decisions granting and denying belated appeal requests premised on counsel's asserted failure to notice the appeal. See *McDonald*, 146 S.W.3d at 888, 890 (examining the function of the motion under the Sixth Amendment); *Langston v. State*, 19 S.W.3d 619, 621 (Ark. 2000) (applying *Strickland* and *Flores-Ortega*); see also *Strom v. State*, 74 S.W.3d 233, 235 (Ark. 2002); *Marek v. State*, 620 S.W.3d 181, 182 (Ark. 2021); *Mallett v. State*, 954 S.W.2d 247, 248 (Ark. 1997); *Beene v. State*, 2018 Ark. 120, 3 (2018).

Other states are yet different in their own ways. In Ohio, the prisoner seems to have access to seek either ordinary postconviction relief, Ohio Rev. Code § 2953.21,

or file a motion for a delayed appeal. See *State v. Gover*, 645 N.E.2d 1246, 1249 (Ohio 1995) (citing *Steed v. Salisbury*, 459 F.2d 475 (6th Cir. 1972)). In New York, a prisoner can use a motion for a late appeal under N.Y. Crim. P. L. § 460.30, within one year of the deadline, and can seek a *coram nobis* writ if the issue is pursued at a later time. See *People v. Andrews*, 23 N.Y.3d 605, 611–12, 614 (2014). In Colorado, a *Strickland* claim is usually brought in its ordinary Rule 35 postconviction vehicle, but in 2005 its Supreme Court authorized an alternate method based on filing a late notice of appeal, and asserting counsel’s deficiency as “good cause” to excuse untimeliness. *People v. Baker*, 104 P.3d 893, 898 (Colo. 2005) (establishing the alternative).

The Petition’s attempt to enlist the Tenth Circuit, Pet. 16–17, is unfounded. Neither cited decision construed § 2244(d)(2)’s “other collateral review” clause. *Orange v. Calbone* held that a *granted* Oklahoma out-of-time appeal was part of “direct review” under § 2244(d)(1)(A)—the finality question this Court later settled in *Jimenez*. 318 F.3d 1167, 1170–71 (10th Cir. 2003); see Pet. 16 (acknowledging that *Orange* “anticipated” *Jimenez*). Its passing observation that a *denied* application “can, at most, only toll” the limitations period, *id.* at 1173, was dicta. And *Washington v. Dowling* is an unpublished, non-precedential order that—in the Petition’s own words—assumed tolling “without analysis,” Pet. 16, while dismissing the habeas petition as untimely anyway. 793 F. App’x 667, 670–71 (10th Cir. 2019).

The upshot is that the claim of a circuit divide is overstated. The Eleventh Circuit and Eighth Circuit disagree about the treatment of this kind of unusual belated-appeal scheme adopted by Florida and Arkansas. But state-by-state variation

in how *Flores-Ortega* claims are channeled is the norm, not a lack of uniformity warranting this Court's correction.

II. The Question Presented is not important

The question of how § 2244(d)(2) applies to Arkansas's belated-appeal procedure arises rarely, creates minimal costs to state criminal justice systems, and is otherwise of no national importance.

A. The Question Presented rarely arises

Contrary to the Petition (at 12, 17), the issue presented for review almost never arises. For this tolling question to control the timeliness of a habeas petition, an unusual constellation of circumstances must align: (1) trial counsel must fail to file a timely notice of appeal; (2) the petitioner must properly file—but ultimately lose—a belated-appeal motion; (3) the petitioner must then file a federal habeas petition that misses the one-year statute of limitations; and (4) the petition must miss the deadline by a Goldilocks margin—more than zero, but less than the number of days the belated-appeal motion was pending. If the petition is timely, tolling is irrelevant; if it is too late, tolling cannot save it.

Here, Mr. Garrett's petition otherwise would have been either five or eleven days late, App. 29a–30a, 33a–34a, so the twenty days his belated-appeal motion was pending was decisive. But such a precise alignment of events is exceedingly rare. When the magistrate judge below surveyed Arkansas district court cases for guidance, she identified only a single, decade-old recommendation where a belated-appeal motion seeking a direct appeal was a but-for cause of untimeliness. *See* App. 45a n.13 (citing *Gray v. Hobbs*, No. 5:10-cv-218, 2012 WL 1648401, at *3 (E.D. Ark.

May 10, 2012)). This Court’s certiorari resources are not warranted to review the Eighth Circuit’s application of § 2244(d)(2) to a set of state-law circumstances that appear to be a once-in-a-decade anomaly.

The purported circuit split confirms the lack of recurrence. Section 2244(d)(2) has been on the books for over three decades, and state-prisoner habeas litigation comprises a significant portion of the federal docket. As a result, there is robust development of many recurring AEDPA questions arising out of such voluminous litigation. Here, however, there is virtually no percolation. Statutory tolling under any state’s belated-appeal scheme has generated only three circuit opinions squarely weighing in. That is a telling sign that this issue is not important or frequently recurring.

B. The Question Presented is not otherwise important

The State attempts to inflate the importance of this case by claiming this Court “anticipated” the Question Presented in *Jimenez v. Quarterman*. See Pet. i, 15–19, 21–23. The State leans on footnote 4 of *Jimenez*, asserting that the Court left open the question whether a denied belated-appeal triggers tolling under § 2244(d)(2). Pet. 17–18. But *Jimenez* did no such thing. The hypothetical in the *Jimenez* footnote is notably different from the § 2244(d)(2) issue here.

In *Jimenez*, the petitioner’s direct appeal was dismissed in 1997 because his attorney withdrew and he failed to file a pro se brief. Five years later, well after his AEDPA clock expired, Jimenez won state habeas relief on due-process grounds in the form of a new appeal. *Jimenez*, 555 U.S. at 116–17. This Court held that the state court’s grant of habeas relief reopening the direct appeal rendered the judgment not

final under § 2244(d)(1)(A), until that reinstated appeal concluded. *Id.* at 120. And upon doing so, this Court noted in footnote 4 that it was not deciding what would have happened if Jimenez had sought federal habeas relief *before* the state court reopened his appeal—a period of time when his federal statute of limitations would have already unquestionably run. *Id.* at 120 n.4.

This case, by contrast, concerns only whether the pendency of state-court litigation that asks to reopen direct review counts toward the statute of limitations. If this type of situation had happened in Texas, there really would be no question to be had, because Texas redresses such forfeited appeals through the ordinary state habeas vehicle—the Article 11.07 petition—when due process or *Strickland* grounds exist. *See id.* at 116; *cf. Ex parte Axel*, 757 S.W.2d at 374. And there is no question that a properly filed Article 11.07 state habeas petition qualifies for tolling under § 2244(d)(2). *See, e.g., Emerson v. Johnson*, 243 F.3d 931, 934–35 (5th Cir. 2001). The resolution of the § 2244(d)(2) status of Arkansas belated-appeal requests, and the resolution of the *Jimenez* footnote, do not bear on one another.

The State and its *amici* also overstate any burden on state criminal justice, which is minimal at best. The *amici* assert that the ruling below will incentivize prisoners to clog state dockets with frivolous belated-appeal motions simply to delay federal habeas proceedings. *See Br. of Ohio et al.* 6, 15–19. That assertion rests only on groundless conjecture, but there is an important signal in what *amici* omit. The Sixth Circuit has applied the same tolling rule for years, yet *amici* do not identify a

single instance of a prisoner in its circuit vexatiously using the delayed-appeal motion to push back federal review.

Amici's conjecture also has the incentives backwards. A prisoner can only seek a belated appeal *by forfeiting a timely direct appeal*. The standard of review in a direct appeal is far more favorable to defendants than the deferential standard under federal habeas. Direct appeals also typically push back federal review much farther. It takes state courts roughly 500 days to dispose of a typical non-capital appeal,⁴ not counting later requests for discretionary review and certiorari. That is about 25 times longer than the pendency of Mr. Garrett's belated-appeal motion in this case. The trade *amici* hypothesize—a full-dress appeal and all subsequent processes exchanged for a failed belated-appeal motion and a modest extension of the AEDPA clock—would lighten the burden on state courts, not add to it.

III. The decision below is correct

Review is also not appropriate because the Eighth Circuit correctly applied this Court's § 2244(d)(2) precedent. The belated-appeal motion is the sole Arkansas vehicle for pursuing—and thus exhausting—a habeas-cognizable *Strickland* claim. And the motion can only be brought after the judgment of conviction is final upon expiration of opportunity to seek direct review. So by definition, a motion for a belated

⁴ See Nat'l Ctr. for State Cts., *Appellate Court Performance Measures: Time to Disposition* 4 (2011) (noting 449 median days and 522 mean days to dispose an appeal, excluding time for further discretionary review), *available at* https://www.ncsc.org/sites/default/files/media/document/courtools_appellate_measures_time_to_disposition.pdf.

appeal must be a post-conviction remedy. And if the motion is granted, direct review is reinstated, thus undoing the finality of the judgment. *Gonzalez v. Thaler*, 565 U.S. 134, 149–50 (2012). Under the plain text of § 2244(d)(2)—and under the only reading that preserves a modicum of comity—the motion that Mr. Garrett filed was an application for “collateral review with respect to the pertinent judgment or claim.”

A. The decision is correct under the text of § 2244(d)(2) and this Court’s precedents

Section 2244(d)(2) tolls the limitations period during the pendency of a “properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim.” Most of that language is not in dispute. The magistrate judge found—and the State has never contested—that Mr. Garrett’s motion was “properly filed” and squarely concerned “the pertinent judgment or claim.” App.36a, 40a–41a. At issue is only whether the application is one for “post-conviction” “or other collateral” “review.” As authoritatively construed in this Court’s AEDPA cases, an Arkansas belated-appeal motion satisfies each term.

“Post-conviction review” is exactly that: review sought after the judgment of conviction has become final. AEDPA itself fixes that line at “the conclusion of direct review or the expiration of time for seeking such review,” § 2244(d)(1)(A), reflecting the “long-recognized, clear meaning” of finality this Court has repeatedly reaffirmed. *Clay v. United States*, 537 U.S. 522, 527 (2003); see *Gonzalez*, 565 U.S. at 149–50. An Arkansas belated-appeal motion is post-conviction review in precisely that sense. As the panel observed—and neither the Petition nor the dissent disputes—such a motion “necessarily” is filed after “the judgment has become final.” App.10a n.4. The motion

exists only because the time for seeking direct review has expired. *Dodson*, 288 S.W.3d at 665.

The motion likewise seeks review “with respect to the pertinent judgment” because it places the finality of the judgment itself before the Arkansas Supreme Court. If the motion is granted, the finality is gone: the appeal is reinstated, and the judgment does not become final again until the reinstated direct review concludes. *Jimenez*, 555 U.S. at 120–21; *Gonzalez*, 565 U.S. at 149–50; see App.11a (a meritorious motion “reinstates a state court’s jurisdiction” to hear the appeal, thereby “provid[ing] . . . [it] with authority to order relief from a judgment” (quoting *Kholi*, 562 U.S. at 556 n.4)). A motion whose grant dissolves the finality of the judgment of conviction is a request for review “with respect to” that judgment.

The motion is equally a request for review “with respect to the pertinent . . . claim.” A “claim,” within § 2244 and across AEDPA, is “an asserted federal basis for relief from a state court’s judgment of conviction.” *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005) (Scalia, J.). The recognized function of the Arkansas belated-appeal motion is to adjudicate exactly such a claim: “a denial of due process and a denial of effective assistance of counsel.” *McDonald*, 146 S.W.3d at 890; see *Langston*, 19 S.W.3d at 621 (applying *Strickland* and *Flores-Ortega*). That Sixth Amendment claim is a staple of federal habeas review. *Flores-Ortega*, 528 U.S. at 477–78; *Lozada*, 498 U.S. 430. Its cognizability is familiar to the Arkansas Supreme Court, which has complied with conditional writs on *Strickland* claims arising out of erroneous belated-appeal denials. See *McDuffie*, 826 S.W.2d at 809–10; *Philyaw*, 728 S.W.2d at 151. And it is

the only claim Mr. Garrett presses in his federal petition. His motion, as the panel put it, was “plainly a ‘direct request[] for judicial review’ of the only claim he has brought in federal habeas proceedings.” App. 15a. Neither the Petition nor the dissent explains how a motion to adjudicate a habeas-cognizable constitutional claim is not a motion for review “with respect to” that claim.

A belated-appeal motion also calls for review that is “collateral.” In *Kholi*, this Court resolved a circuit disagreement that effectively classified some requests for state-court “review” as neither direct nor collateral. 562 U.S. at 550 n.2.⁵ *Kholi* abrogated this practice by defining “collateral” review broadly to mean anything that is not “direct review.” “Collateral review” refers to any review that is “[l]ying aside from the main’ review, *i.e.*, that is not part of direct review.” See *Kholi*, 562 U.S. at 551 (quoting Webster’s Third New International Dictionary 444 (1993)).

The character of an Arkansas belated-appeal motion under that definition is fixed by state law, and Arkansas’s highest court has supplied the answer: “a motion for belated appeal is not part of the ordinary appellate review process.” *Dodson*, 288 S.W.3d at 665. The panel plugged *Dodson* into *Kholi*’s definition. The panel further recognized—without dispute from Petition or the dissent—that a belated-appeal request “necessarily” is filed after direct review is over and the “judgment has become final.” App.10a n.4. That premise is a feature of state law, and it is dispositive: after

⁵ See, *e.g.*, *Hartmann v. Carroll*, 492 F.3d 478, 482 (3d Cir. 2007) (reasoning that the review requested “operated independently” of “Delaware’s direct and collateral appellate review mechanisms”).

Kholi, there is no mythic third category of state-court review of a pertinent judgment or claim that is neither “collateral” nor “direct.”

The Petition, echoing the dissent below, posits that a belated-appeal motion is not “collateral” because it is not sufficiently outside of direct review and is closer to the direct-review “track” than a collateral review “track.” Pet.22–23 (citing App.17a–19a (Stras, J., dissenting)). The implication is that a belated-appeal motion falls into a void—it is not direct review, yet it is too direct to be collateral. But *Kholi* forecloses such parsing. After *Kholi*, no court construing § 2244(d)(2) has suggested that a review of a judgment or claim might be neither “collateral” nor “direct.” See 1 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice & Procedure*, § 5.2 (collecting earlier cases abrogated by *Kholi* doing that). Even the Eleventh Circuit’s treatment of Florida’s belated appeals limits its reasoning to the notion it is not “review” of the judgment or claim, *Danny*, 811 F.3d at 1304–05, without attempting to place belated appeal motions into a neither-direct-nor-collateral void. There is no conflict on this premise, and the Court need not entertain a question on whether *Kholi* left room for one.

A belated-appeal motion also requests “review.” *Kholi*’s footnote 4, on which the Petition relies, Pet. 20–22, set aside “a motion for post-conviction discovery or a motion for appointment of counsel, which generally are not direct requests for judicial review of a judgment and do not provide a state court with authority to order relief from a judgment,” 562 U.S. at 556 n.4. A belated-appeal motion differs from both. It is a direct request for review: it asks the Arkansas Supreme Court to adjudicate the

movant’s *Strickland* claim. And granting the motion provides relief from the judgment—finality is stripped and appellate review of the conviction follows. App. 11a (“a meritorious motion requires a state court to entertain the defendant’s attack on his judgment”). A prisoner asking a court for an appeal is thus asking that court, directly, to review the finality of the judgment.

B. The decision below advances federal-state comity

The decision below is not merely correct on the text, but it also advances § 2244(d)(2)’s core purpose. This Court has repeatedly stressed that “[t]he 1-year deadline” in habeas must be read to “promote[] exhaustion of claims and respect[] state-court processes[.]” *Rivers v. Guerrero*, 605 U.S. 443, 455 (2025). To that end, this Court instructs that the § 2244(d)(2) “tolling provision” be read to be in doctrinal harmony with the exhaustion requirement. *See Carey v. Saffold*, 536 U.S. 214, 220 (2002). The role of § 2244(d)(2) within AEDPA is to serve as a “powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts,” considering that exhaustion is a “strict[ly] enforce[d]” requirement. *Duncan v. Walker*, 533 U.S. 167, 180 (2001) (examining § 2244(d)(2)’s function in promoting exhaustion) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)).

Section 2244(d)(2) is not properly read to force state prisoners to seek federal review before they have finished exhausting state post-conviction procedures for raising this kind of a *Strickland* claim. *See Carey*, 536 U.S. at 220. Doing so would create “great uncertainty in the federal courts, requiring them to contend with habeas petitions that are in one sense *unlawful* (because the claims have not been exhausted) but in another sense *required* by law (because they would otherwise be barred by the

1-year statute of limitations).” *Id.* (emphasis in original). The tolling rule thus “reinforces the importance of *Lundy*’s ‘simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court.’” *Rhines v. Weber*, 544 U.S. 269, 276 (2005) (citing § 2244(d)(2) and quoting *Lundy*, 455 U.S. at 520).

A contrary rule would untether § 2244(d)(2) from the strict exhaustion requirement. By not pausing the federal clock, litigants seeking *Strickland* relief from wrongly forfeited appeals (or such relief on due-process grounds), would be forced to file unexhausted petitions that frustrate orderly review. *Carey*, 536 U.S. at 220. That would be particularly damaging to comity principles where, as is sometimes the case, a belated-appeal results in a limited hearing that takes several months to fully adjudicate. *E.g.*, *Marek*, 620 S.W.3d at 182 (hearing ordered to resolve facts about counsel’s failure to file the notice). The Eighth Circuit thus correctly determined that Arkansas’s post-conviction procedure for raising this kind of a *Strickland* claim be completed first, before the intrusion of federal habeas review.

IV. This case is a poor vehicle

This case is also a sub-par vehicle because it does not cleanly present the broader issues Petitioner identifies, and because the question that is actually presented—about this kind of belated-appeal motion—needs further percolation.

The Petition principally seeks resolution of whether § 2244(d)(2) applies to motions that are geared toward a review of judgment only by taking a “step in that direction,” Pet. 11, 20 (quoting App.20a), without demanding immediate review. See Pet. 13–14, 20–22. Even if it were otherwise important to provide more guidance on

§ 2244(d)(2) status of such attenuated motions, this case is the wrong vehicle because it does not cleanly present that question. The Eighth Circuit majority did not hold that the belated-appeal motion was a mere step towards review. As set forth above, such a motion itself provides review because, if granted, it eliminates the finality of the judgment.

To reach any “step” question, the Court therefore would first have to navigate threshold state-law obstacles that the Petition (and dissent below) ignores. The § 2244(d)(2) status of genuinely attenuated filings does arise—in other contexts. Courts have applied the tolling provision to sequential filings that compel no review of the judgment on their own: DNA-testing motions that lead nowhere absent favorable results and an additional motion attacking the conviction based on those results, *see Kares v. Morrison*, 77 F.4th 411, 419–21 (6th Cir. 2023); *Hutson v. Quarterman*, 508 F.3d 236, 239 (5th Cir. 2007); motions merely to extend the time to file a state postconviction petition, *Jenkins v. Superintendent*, 705 F.3d 80, 86 (3d Cir. 2013) (tolling despite the State’s objection that the filing was “merely a procedural motion to enlarge the time . . . rather than an actual substantive petition”); and motions to reopen postconviction proceedings or recall a postconviction mandate, *Streu v. Dormire*, 557 F.3d 960, 963–65 (8th Cir. 2009); *Bishop v. Dormire*, 526 F.3d 382, 383 (8th Cir. 2008) (stating such motions do not directly attack the criminal judgment and are “not necessary to exhaust any federally cognizable claims”).

Any of those scenarios might present a clean vehicle to resolve the “step-in-that-direction” question the Petition advances. But this case does not. To reach

Petitioner’s theory, the Court would first have to examine whether an Arkansas belated-appeal motion *is* attenuated. It is not, for the reasons shown above. *See supra* Part III.A. And the motion is the only Arkansas law vehicle for redressing a wrongly-denied direct appeal on *Strickland* or due process grounds. *See McDonald*, 146 S.W.3d at 888–90. Only if the Court rejected both premises could it reach the question of whether the belated-appeal motion is too attenuated an attack on judgment.

Any attempt to resolve the Question Presented thus would have to grapple with questions of state law that—as the petition appears tacitly to concede—leave no other collateral vehicle for exhaustion of habeas-cognizable claims. The Court should await a vehicle where a state-court filing is genuinely attenuated from the judgment or claim, rather than grant review where threshold issues frustrate clean resolution.

As for the Arkansas belated-appeal question that is squarely presented, the lack of circuit percolation makes intervention premature. The sole contrary authority from the Eleventh Circuit regarding Florida’s scheme is thinly reasoned, leaving the competing arguments underdeveloped.

The Eleventh Circuit’s rule originated in the context of a Florida request for a belated *postconviction* appeal. In *Espinosa v. Sec’y, Fla. Dep’t of Corr.*, the court held that a belated appeal of postconviction review—as opposed to direct review of the judgment itself—did not toll the AEDPA clock. 804 F.3d 1137, 1140 (11th Cir. 2015). Of course, there might be good reason to deny tolling for a belated *postconviction* appeal. Unlike a reinstated direct appeal, a postconviction appeal does not disturb the underlying “judgment” or its finality. Cf. *Gonzalez*, 565 U.S. at 149–50 (2012).

Moreover, unlike a direct appeal, counsel’s deficient failure to notice a postconviction appeal does not supply a cognizable “claim” for federal habeas review. Compare *Flores-Ortega*, 528 U.S. at 475 (recognizing a cognizable *Strickland* claim for counsel’s failure to notice a direct appeal), with *Coleman v. Thompson*, 501 U.S. 722, 755 (1991) (finding no constitutional right to effective postconviction counsel), and § 2254(i) (codifying that “[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief”). A motion for a belated *postconviction* appeal, therefore, arguably does not review any pertinent judgment or claim.

The split only materialized when the Eleventh Circuit extended *Espinosa* to belated *direct* appeals in *Danny v. Sec’y, Fla. Dep’t of Corr.*, 811 F.3d 1301 (11th Cir. 2016). Although the Eleventh Circuit acknowledged it was breaking new ground, *see id.* at 1302, *Danny* merely stated that a request for the “right to prosecute a direct appeal” is not an examination of a judgment or claim. *Id.* at 1304. That restriction in *Danny*’s analysis means the Eleventh Circuit did not touch on the question whether asserting an entitlement to a direct appeal is—of itself—a request to review that “judgment” as that term is used in §§ 2254(a) and 2244(d)(1)(A). After all, the petitioners in *Flores-Ortega* and *Lozada* sought federal habeas review of the “judgment of a State court,” § 2254(a), by asking for a writ compelling their wrongly denied direct appeals due to counsel’s failure to file the notice. *Danny* also did not address the “or claim” clause in § 2244(d)(2). Compare *Danny*, 811 F.3d at 1304–05, with App. 15a (opinion below, emphasizing the “. . . or claim” statutory language).

Danny also offers no support for Petitioner’s alternate theory before this Court—that a belated-appeal motion falls into a void outside of § 2244(d)(2) because it is neither “direct” nor “collateral.” See Pet. 22–23. That argument is wholly undeveloped among existing circuit authority.

Finally, the interlocutory posture of this case weighs against certiorari. The Eighth Circuit’s decision did not grant habeas relief or resolve the merits of Mr. Garrett’s underlying claim. It merely reversed a threshold dismissal and remanded for the district court to consider the *Strickland* claim in the first instance. This Court routinely adheres to the practice of awaiting a final judgment before granting certiorari, especially where remand proceedings remain pending in the lower courts. Cf. *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari) (noting that such remand proceedings are a reason to wait on certiorari) (citing R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 4.18, pp. 224–226 (6th ed. 1986)). If Mr. Garrett prevails on the merits, this Court’s denial of certiorari will not “preclude [the State] from raising the same issues in a later petition, after final judgment has been rendered.” *Va. Military Inst.*, 508 U.S. at 946 (Scalia, J., respecting denial of certiorari).

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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